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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 684

COPPERWELD STEEL COMPANY,

Appellant,

vs.

INDUSTRIAL COMMISSION OF OHIO

APPEAL FROM THE SUPREME COURT OF OHIO

STATEMENT IN SUPPORT OF JURISDICTION

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IN THE SUPREME COURT OF OHIO

No. 29,746

COPPERWELD STEEL COMPANY,
Plaintiff,

vs.

INDUSTRIAL COMMISSION OF OHIO,
Defendant

STATEMENT IN SUPPORT OF JURISDICTION

The appellant, Copperweld Steel Company, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

Statutory Provisions Conferring Jurisdiction

Jurisdiction of the Supreme Court of the United States to review upon appeal in the instant case is conferred by Title 28, §§ 344(a) and 861 a of the United States Code.

Statute of the State, the Validity of Which Is Involved Herein

The statute of the State of Ohio, the validity of which has been sustained by final judgment of the Supreme Court of Ohio, the highest Court of such State, as not being repugnant to the Constitution of the United States is the Work-

men's Compensation Act set forth in the General Code of Ohio ("G. C.") §§ 1465-37 to 1465-112, inclusive, providing among other things that the decisions of the Industrial Commission upon claims for workmen's compensation on account of injuries or death of employees shall be final, except that claimants may appeal from denial of such claims on any of the grounds specified therein (G. C. § 1465-90; 120 O. L., S. 159, § 1); and further providing:

(a) For the creation of a state liability board of awards (G. C. § 1465-37), superseded by the Industrial Commission of Ohio (G. C. § 871-12; 103 O. L. 97, § 12);

(b) For the classification by the Industrial Commission of occupations or industries with respect to hazards, the determination of risks and fixing of rates of premium for the different classes, based on payroll or such other basis as the Commission may determine, to provide and maintain a state insurance fund adequate for workmen's compensation provided in the act (G. C. § 1465-53);

(c) For the fixing of rates of premium, to provide a solvent state insurance fund and surplus and granting the Industrial Commission power to apply that form of rating system in its judgment best calculated to merit or individually rate the risk more equitably, predicated upon the basis of individual industrial accident experience (G. C. § 1465-54);

(d) For the compulsory payment semi-annually by employers subject to the Act of premiums for workmen's compensation determined by the classifications, rules and rates made and published by the Commission, except as to those employers who qualify and elect to pay compensation direct and are only required to pay such portion of the premiums otherwise payable as are required to be credited to the surplus (G. C. §1465-69);

(e) That employers complying with the act shall not be liable for damages at common law or by statute for

injuries or deaths of employes occurring during the period covered by the premiums paid or qualification for self-insurance (G. C. §1465-70);

(f) For payment from the state insurance fund or by self-insuring employers direct to employes injured in the course of, and arising out of, their employment and to their dependents in case death has ensued (G. C. §1465-68, §1465-72);

(g) That any employe whose employer has failed to comply with the act who has been injured in the course of employment, or his dependents in case of death, may file application for and be awarded compensation; that any employe of a self-insuring employer may, in event of failure of his employer to pay compensation, file application with like effect; and for collection of any award in either case by civil action instituted by the attorney general of the state (G. C. §1465-74). The Supreme Court of Ohio has construed this section of the statute as permitting non-complying and self-insuring employers to contest the validity of any such award on any legal ground (including the ground that the injury or death did not arise in the course or out of the employment) by way of defense in the action for collection of such awards;

(h) That if any employer who has complied with the Act shall default in any required payment to the state insurance fund for a period of ten days after notice that payment is due, the Commission shall certify its finding to the Attorney General who shall forthwith institute a civil action against the employer and unless the employer within ten days execute bond to the state in double the amount claimed, the Court shall appoint a receiver of the employer's business (G. C. §1465-75); the corporation, its president, secretary, general manager or managing agent will be personally subject to fine and imprisonment (G. C. §1465-69 a) and the corporation, in case of injury to an employe or ensuing death is not entitled to the benefits of the Act but may be sued, and in such case, barred of the common law

defenses of the fellow-servant rule, assumption of risk, and contributory negligence (G. C. §1465-73).

Date of Judgment and Date of Application for Appeal

The date of the final judgment of the Supreme Court of Ohio, which is now sought to be reviewed, was July 19, 1944; the Petition for Appeal was presented herewith, within three months thereafter, as required by Title 28, §350 U. S. C.

Nature of the Case and Rulings of the Court

The case originated on petition filed by appellant in the Supreme Court of Ohio for relief against six certain orders of the Industrial Commission awarding workmen's compensation by reason of injuries and deaths of employes of appellant, alleging, inter al., that such injuries and deaths did not arise in the course or out of their employment; that the findings and orders of the Commission are unreasonable and unlawful in that they are not supported by any evidence but are contrary to the uncontroverted evidence before the Commission, are contrary to law, constitute a gross abuse of discretion, if any, and of the power and authority, and are beyond the jurisdiction, of the Commission and would deprive the Plaintiff of its property without due process and deny it the equal protection of the laws.

In the petition appellant prayed that the orders of the Industrial Commission be set aside, vacated and reversed; that the claims and each of them be disallowed; that a writ issue prohibiting and enjoining the defendant from continuing such orders or any of them in effect, from making any payments thereunder, from taking into consideration any payments which may have been made thereunder in the merit or individual rating of the appellant's workmen's compensation risk, and requiring the defendant to vacate

such orders and disallow such claims; and for all such further relief to which the appellant may be entitled.

A motion to the petition was treated as a general demurrer (142 O. S. 439, 440) and sustained by the Court January 19, 1944. The Court in its opinion (142 O. S. 439) held (Syl. 1) that the provisions of G. C. § 871-38 that any employer or other person in interest, dissatisfied with any order of the Commission, may commence an action in the Supreme Court of Ohio against the Commission to set aside, vacate or amend any such order on the ground that it is unreasonable and unlawful and vesting the Supreme Court with exclusive jurisdiction, does not apply to orders awarding workmen's compensation under G. C. § 1465-90; that such orders are final, and that prohibition (Syl. 2), mandamus (Syl. 3), or other relief was not available to appellant.

An application for rehearing was filed and denied.

The opinion of the Court indicated questions as to the meaning and sufficiency of certain allegations; therefore an amendment to the petition was filed alleging in greater detail the absence of facts essential to compensability, abuse of discretion on the part of the commission, direct financial interest of the Plaintiff in the distribution of the state insurance fund, and the extent of such interest, and of the deprivation of its property without due process.

A general demurrer to the petition and amendment was sustained and final judgment entered for defendant July 19, 1944, thereby leaving in effect the illegal orders of the Commission, unsupported by evidence and entered in excess of its jurisdiction.

From the opinions the position of the majority of the court is clearly that under the Workmen's Compensation Act the action of the Commission allowing claims is final (142 O. S. 439, 441); that appellant is not entitled to remedy by review or other relief and that appellant was not thereby

deprived of property without due process or denied the equal protection of the laws (143 O. S. 591) although the premiums required to be paid by it for workmen's compensation will be increased and although non-complying employers and self-insuring employers are in position to obtain review of awards of compensation which are similarly illegal, unreasonable, void and beyond the jurisdiction of the Commission. That the Act so construed deprives appellant of property without due process of law and denies it the equal protection of the law is clearly demonstrated in the dissenting opinion (143 O. S. 596) of Judges Bell and Hart.

Substantiality of Questions Involved

This case involves the denial of due process and equal protection of the laws by refusal of review or other remedy to an employer contributing to the state insurance fund against unlawful awards of workmen's compensation in claims for injuries and deaths which were not occasioned in the course of or by the employment and therefore are not compensable, particularly in comparison with self-insuring and non-complying employers as well as claimants, all of whom are afforded a review or other means of testing the legality of the orders of the Commission.

The resulting unlawful increase in the premiums charged appellant over a period of five years will be substantial, having already developed to the extent of $20,018.62 in the year 1943.

The particular question presented—the denial of hearing on questions of law—is novel. On such questions the workmen's compensation acts generally afford some form of review. Substantiality of the questions involved is apparent when the precise question has not been passed on before.—*Senn v. Tile Layers Protective Union*, 301 U. S. 468, 476.

The Supreme Court of the United States has previously recognized the appealability of cases challenging the constitutionality of workmen's compensation laws according finality to decisions of the administrative tribunal on questions of fact; but the laws involved in those cases provided for review or appeal on legal grounds and they were held constitutional. *Hawkins* v. *Bleakly*, 243, U. S. 210; *Booth Fisheries Co.* v. *Industrial Com. of Wis.*, 271 U. S. 208.

The Supreme Court of Ohio has likewise previously recognized that denial of review other than on questions of fact would be unconstitutional.—*Coal Co.* v. *Industrial Com.*, 108 O. S. 185, 190; *Slatmeyer* v. *Industrial Com.*, 115 O. S. 654, 658; *State, ex rel., Slaughter* v. *Ind. Comm.*, 132 O. S. 537, 542.

Cases Supporting Jurisdiction

Administrative orders of a judicial or quasi-judicial nature are void if a judicial hearing is denied, if the hearing granted is manifestly unfair, if the finding is indisputably contrary to the evidence, if the facts found do not as a matter of law support the order made.—*Interstate Commerce Com.* v. *L. & N. R. R. Co.*, 227 U. S. 88, 91; *Ohio Valley Water Co.* v. *Ben Avon*, 253 U. S. 287; *The Chicago Junction Case*, 264 U. S. 258; 44 S. Ct. 317; *Northern Pac. Ry. Co.* v. *Dept of Public Works*, 268 U. S. 39. Appeal (or writ of error) was allowed in these cases.

An inquiry as to whether an order is reasonable and in conformity to law or whether it is supported by any evidence is judicial in character.—*Fed. Radio Com.* v. *Nelson Bros. B. & M. Co.*, 289 U. S. 266, 277; *Public Service Com.* v. *Havemeyer*, 296 U. S. 506.

Administrative orders unsupported by evidence showing the facts required by the statute as basis for the order are beyond the power or jurisdiction of the Commission.—*Hawkins* v. *Bleakly, supra; Waite* v. *Macy*, 246 U. S. 606;

Fed. Radio Com. v. *Nelson Bros. B. & M. Co., supra; Slatmeyer* v. *Industrial Com., supra; U. S.* v. *Abilene & S. Ry. Co.*, 265 U. S. 274; *Crowell* v. *Benson*, 285 U. S. 22.

The question whether the injury or death arose in the course of employment is jurisdictional. *State, ex rel., Butram* v. *Ind. Com.*, 124 O. S. 589, 593; *State, ex rel., Randolph* v. *Ind. Com.*, 128 O. S. 27, 30; *Humphries* v. *Steel Corp.*, 132 O. S. 263, 270.

The right to judicial hearing or review upon questions essential to the jurisdiction of the Commission and the legality of an award, are recognized in *Fassig* v. *State, ex rel.*, 95 O. S. 232, 242; *Coal Co.* v. *Industrial Com.*, 108 O. S. 185, 190; *Clemmer & Johnson Co.* v. *Industrial Com.* 112 O. S. 421; *Slatmeyer* v. *Industrial Com.*, 115 O. S. 654, 656-658; *State, ex rel., Slaughter* v. *Industrial Com.*, 132 O. S. 537, 542; *Hawkins* v. *Bleakly, supra; Booth Fisheries Co.* v. *Industrial Com. of Wis.*, 271 U. S. 208. Appeal was allowed in the two cases last cited, involving Workmen's Compensation Acts.

Denial of due process will result from denial of judicial hearing or review. *Ohio Valley Water Co.* v. *Ben Avon, supra; Coal Co.* v. *Industrial Com., supra; Slatmeyer* v. *Industrial Com., supra.* This is true even though appellant have no legal interest in the state insurance fund and be not a necessary or proper party to the proceedings before the Industrial Commission since the operative effect of the act is to deprive it of property without due process. *Voeller* v. *Warehouse Co.*, 136 O. S. 427.

Likewise the equal protection of the laws is denied where others are afforded relief: *Coal Co.* v. *Industrial Com., supra; Smith* v. *Cahoon*, 283 U. S. 553; *Hawkins* v. *Bleakly, supra.*

To require that appellant default in payment of future premiums in order to test the validity of the awards included in computation thereof, foregoing the protection

of the act against suits at common law and subjecting itself and its officers to the other penalties of G. C. §§ 1465-69a, 1465-73, 1465-75 would deny due process. *Cotting* v. *Kansas City Stockyards Co.*, 183 U. S. 79; *Ex parte Young*, 209 U. S. 123; *Wadley Southern Ry. Co.* v. *Georgia*, 235 U. S. 651, 661; *Santa Fe Pac. R. R.* v. *Lane*, 244 U. S. 492; *DeWitt* v. *State*, 108 O. S. 513, 533 (Opinion of five judges dissenting from prevailing opinion of two judges).

Stage at Which Federal Questions Raised

The Federal questions sought to be reviewed were first raised by the following allegations in the petition:

> "(e) The orders of the defendant are contrary to law, constitute a gross abuse of discretion, if any, and of the power and authority, of the defendant and are beyond the jurisdiction of the defendant.
>
> "(f) The aforesaid orders of the Commission unless vacated, prohibited or enjoined will result in the merit, or individual, rating of the plaintiff's Workmen's Compensation risk to the prejudice of plaintiff, and in unlawfully charging and collecting from the plaintiff premiums therefor in excess of those which should and may legally be charged and collected.
>
> "(g) The aforesaid orders of the Commission, unless vacated, prohibited or enjoined, will deprive the plaintiff of its property without due process of law and will deny it the equal protection of the law.".

In the amendment to the petition, it was alleged that:

> "Unless this Court review and vacate, prohibit or enjoin the orders of the defendant or require the defendant to vacate and set the same aside this plaintiff will be deprived of its property without due process of law and will be denied the equal protection of the laws."

The Court clearly passed upon them as indicated by its opinions of January 19, 1944 and July 19, 1944. Both of

these decisions are based upon the finality accorded orders of the Commission by the Act (G. C. §1465-90) and upon the position that the contributing employer has no interest in the state insurance fund and is not a proper or necessary party to proceedings before the Commission. The opinion, in which two judges concurred, dissenting from the judgment of July 19, 1944 clearly demonstrates the effect of the Workmen's Compensation Act, the orders of the Industrial Commission, and the judgment in denying the appellant due process and the equal protection of the laws.

Opinions of the Court

Appended hereto are copies of the prevailing and dissenting opinions rendered by the Court in connection with the final judgment of July 19, 1944 and of the earlier opinion rendered in connection with the judgment of January 19, 1944.

Right to Certiorari

Independently of the right of appeal herein, the State of Ohio by the Workmen's Compensation Act, the orders of the Industrial Commission, and the decision and judgment of the court (including in addition to its construction of the Workmen's Compensation Act, its holding that G. C. §871-38 authorizing review is inapplicable and its denial of other remedy) have deprived appellant of property without due process of law and denied it the equal protection of the law—rights, privileges, and immunities guaranteed by Section 1 of the Fourteenth Amendment to the Federal Constitution. Accordingly, if the appeal herein should be considered to have been improvidently taken, the Supreme Court of the United States should consider, and act upon, the papers as a petition for certiorari and as if presented to it at the time they were presented to the Supreme Court of Ohio, under U. S. C., Title 28, §344(c), and grant the relief prayed for.

Wherefore, the appellant, Copperweld Steel Company, respectfully submits that the Supreme Court of the United States has jurisdiction of this appeal under Title 28, §§344 (a) and 861-a of the United States Code; but that if the appeal should be considered as having been improvidently taken, the Court consider it as an application for certiorari and that appellant be granted the relief prayed for in its petition for appeal and assignment of errors.

ROBERT G. DAY,
Attorney for Appellant.

Frank R. S. Kaplan, E. P. McHugh, Jr., Hoppe, Day & Ford of Counsel.

APPENDIX A

OPINIONS OF THE SUPREME COURT OF OHIO

Opinion Sustaining Motion Treated as Demurrer to Petition

(142 O. S. 439)

*Industrial Commission—Appeal to Supreme Court by employer or other party in interest—Section 871-38, General Code—Inapplicable to award of workmen's compensation—Prohibition—Writ not issued to prevent award of workmen's compensation—Mandamus—Discretion not controlled by writ—But performance of duty compelled, where failure due to abuse of discretion.

1. Section 871-38, General Code, which provides that any employer or other person in interest, being dissatisfied with an order of the Industrial Commission, may commence an action in the Supreme Court against the commission to set aside, vacate or amend any such order on the ground that it is unreasonable or unlawful, does not apply to an order allowing a claim for workmen's compensation under power conferred by Section 1465-90, General Code.

2. Prohibition will not issue to prevent the Industrial Commission from carrying out a lawful award of workmen's compensation made to a claimant pursuant to Section 1465-90, General Code.

3. Mandamus will not lie to control the discretion of the Industrial Commission with respect to an award of compensation; but the writ will lie to compel the performance of a duty specially enjoined by law where failure to perform the duty results from abuse of discretion, violation of law or otherwise.

(No. 29746—Decided January 19, 1944)

Appeal from the Industrial Commission.

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A statement of the case appears in the opinion.*

Mr. Robert G. Day and Mr. E. P. McHugh, Jr., for plaintiff.

Mr. Thomas J. Herbert, attorney general, and Mr. Robert E. Hall, for defendant.

Williams, J. This proceeding is brought originally in this court by the Copperweld Steel Company, an employer complying with the workmen's compensation law. The real object sought by plaintiff is to bring about the disallowance of six claims, heretofore allowed by the Industrial Commission, to prevent the awards thereon from being taken into consideration in determining the merit rating to be applied to plaintiff's risk.

The defendant filed a motion to strike out various parts of the petition, but, in view of statements made by counsel in open court on the presentation of the motion, this court now treats the motion as a general demurrer.

It is not necessary to recite the allegations of the petition in full but only those well-pleaded and germane to this inquiry.

On November 13, 1941, six employees of the plaintiff left its industrial plant near the city of Warren, Ohio, after they had finished their work, entered an automobile and proceeded not less than 700 feet along the roadway to a railway grade crossing where the automobile collided with a freight train. In the collision two of the employees were killed and four injured. As a result thereof two claims for death benefits and four for compensation for injuries were filed with and allowed by the Industrial Commission. After the allowances had been made, the employer, plaintiff herein, filed with the commission a petition as to each claim seeking a vacation of the order of allowance and a disallowance of the claim. The petitions were denied and thereupon this suit was instituted.

*It does not affirmatively appear from the petition whether the employees had other means of egress from the grounds surrounding the plant or whether they had

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left the zone of their employment. Allegations of such character would be material on the question of compensability, yet as will be pointed out it is immaterial for the purpose of this case whether those claims are in law compensable or not.

The relief sought by plaintiff is rather sweeping. In the prayer of the petition plaintiff asks: (1) That the "orders of the Industrial Commission be set aside, vacated and reversed; that the * * * claims and each of them be disallowed; (2) that a writ issue prohibiting and enjoining the defendant from continuing such orders or any of them in effect, from making any payments thereunder, from taking into consideration any payments which may have been made thereunder in the merit or individual rating of the plaintiff's workmen's compensation risk, and requiring the defendant to vacate such orders and disallow such claims; and (3) for all such further relief to which the plaintiff may be entitled."

Counsel for plaintiff in their brief and in argument assert that plaintiff is entitled to: (1) a review of the orders of the commission, pursuant to Section 871-38, General Code; or (2) a writ to set aside the orders and compel their disallowance.

The extent to which appeals from orders of the Industrial Commission upon claims for compensation or death benefits may be allowed is provided for in Section 1465-90, General Code. When on rehearing a claim is denied on any ground or grounds specified in that section the claimant is given a right of appeal by filing a petition in the Court of Common Pleas. On the other hand when the claim is allowed the action is final. In that event the complying employer cannot appeal from the order of allowance and the employee * cannot appeal from an order fixing the amount of compensation.

Does plaintiff have a remedy by review under Section 871-38, General Code?

That section insofar as material herein reads thus: "Any employer or other person in interest being dissatis-

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fied with any order of the commission may commence an action in the Supreme Court of Ohio, against the commission as defendant to set aside, vacate or amend any such order on the ground that the order is unreasonable or unlawful and the Supreme Court is hereby authorized and vested with exclusive jurisdiction to hear and determine such action. The commission shall be served with summons as in other civil cases."

Counsel for plaintiff request re-examination of our previous construction of that provision. It was early held that an employee could not bring a proceeding under that section for the allowance of compensation in addition to that which had previously been allowed. Gatton v. Industrial Commission, 93 Ohio St., 203, 112 N. E., 503. Recently it was decided that an employer has no right to have an order, fixing a premium rate, reviewed under this provision. United States Wall Paper Co. v. Industrial Commission, 132 Ohio St., 372, 7 N. E. (2d), 798. Since the decision in the Gatton case there have been many other decisions construing this section. It is now the established rule that its provisions do not confer upon this court power to review orders of the Industrial Commission allowing claims for injury or death arising out of or suffered in the course of employment but apply only to matters pertaining to the safety code. Orders reviewable thereunder are such as "relate to places of employment and to safeguards touching the life, health, and safety of employees." Pittsburg Coal Co. v. Industrial Commission, 108 Ohio St., 185, 188, 140 N. E., 684. United *States Wall Paper Co. v. Industrial Commission, supra. In the two latter reported cases citations to other decisions may be found. Upon re-examination of the question we approve and follow the established rule that orders made by the Industrial Commission under the workmen's compensation law are not reviewable under Section 871-38, General Code.

Is the plaintiff entitled to a writ compelling the setting aside of the awards and disallowance of the claims?

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The plaintiff in its petition has not indicated exactly what kind of a writ is sought. It might be either injunction, prohibition or mandamus. Plaintiff's counsel do not specifically urge that injunction will lie but do ask for a writ "enjoining the defendant." Therefore, we give passing consideration to the applicability of the injunctive remedy. This court has power to grant an injunction pendente lite as ancillary to a cause of which it has jurisdiction, in order to preserve matters in statu quo. However, as to chancery cases in which an injunction is sought as a final remedy, original jurisdiction is vested by statute in the Court of Common Pleas. The Supreme Court has, under the Constitution, no original jurisdiction to afford such relief in chancery.

Counsel for plaintiff do contend that this action is "in prohibition." Prohibition is a remedy calculated to keep inferior tribunals from usurping power with which they have not been invested. It must be borne in mind that it is not sought herein to prevent a merit rating of a complying employer as was the case in State, ex rel. Powhatan Mining Co. v. Industrial Commission, 125 Ohio St., 272, 181 N. E., 99, 82 A. L. R., 938, but to control the action of the Industrial Commission with respect to the allowance or disallowance of certain claims. The power to hear claims and award death benefits and compensation for injuries has been expressly conferred upon the commission by Section 1465-90, General Code, and prohibition will not lie to curb the exercise of that power or to prevent the enforcement of a valid award after it has been made upon claims properly before it, as were the claims in the case at bar.

Do facts pleaded state a cause of action in mandamus? Mandamus is frequently employed to keep the Industrial Commission within legal bounds. The writ's use is limited to compelling the performance of a duty specially enjoined by law whether the failure to perform the duty results from an abuse of discretion, a violation of law, or otherwise.

The complying employer has no direct financial interest in the distribution of the state insurance fund. His interest

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lies in basic and merit ratings and the amount he is required to pay in premiums. With respect to the subject matter involved in a proceeding upon a claimant's application for compensation under Section 1465-90 General Code, the complying employer's interest is remote. He is neither a necessary nor proper party to such a proceeding; not being a party he has no right to appeal or review. The lack of such right, however, does not deprive him of relief through the extraordinary legal remedy of mandamus, when warranted by the facts.

It has previously been stated that it is inconsequential whether the petition alleges facts to show that the claims were in reality compensable. Upon what theory can every complying employer, upon the allowance of a claim by the Industrial Commission, sue out a writ in this court and try the issue of compensability over again? Were this court to issue a writ compelling the Industrial Commission to set aside orders allowing the claims and to enter orders of disallowance, the claimant's right to a rehearing before the commission would be cut off by a prior adjudication in this court. See * State ex rel. Nicholas v. Gregory et al., Industrial Commission, 130 Ohio St., 165, 169, 198 N. E., 182. Thus the result of allowing the writ would be to deny to claimants, who are not parties here, the right to proceed under the express provision of Section 1465-90, General Code, with respect to the determination of their claims. The power to determine compensability is vested in the commission and cannot be interfered with as long as its discretion is exercised soundly and within legal bounds.

Now, the petition does not set up any abuse of discretion on the part of the commission or aver any facts to show that the orders of the commission were void for fraud or otherwise, or invalid by reason of any statutory provision. No case is made out by the allegations of the petition which would show a right to relief by mandamus.

Since the allegations of the petition do not show a right to a review under Section 871-38, General Code, or a right

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to a writ as prayed for or other relief, the petition is subject to a general demurrer.

Petition held demurrable.

WEYGANDT, C. J., MATTHIAS, HART, ZIMMERMAN, BELL and TURNER, JJ., concur.

APPENDIX B

OPINIONS OF THE SUPREME COURT OF OHIO

On Final Judgment

(143 O. S. 591)

Workmen's compensation—Due process or equal protection not denied employer—No statutory right to review order awarding compensation—Employer contending claims not compensable and merit rating affected—Not entitled to relief by extraordinary legal remedy.

1. An employer is not denied due process of law or equal protection of the law by reason of the fact that he is not given a right by statute to review an order of the Industrial Commission awarding workmen's compensation to his employees or dependents of his deceased employees.

2. When such an order is challenged only on the ground that the claims allowed are not compensable, the employer whose merit rating will be affected thereby is not entitled to relief by way of extraordinary legal remedy.

(No. 29746—Decided July 19, 1944)

Appeal from the Industrial Commission

On Demurrer to Petition and Amendment to Petition

The facts are stated in the opinion.

Mr. Robert G. Day and Mr. E. P. McHugh, Jr., for appellant.

Mr. Thomas J. Herbert, attorney general, and Mr. Robert E. Hall, for appellees.

WILLIAMS, J.:

The petition in this case was held demurrable in Copperweld Steel Co. v. Industrial Commission, 142 Ohio St., 439, 52 N. E. (2d), 735, and the substance of the allegations in that pleading may be found in the opinion. Subsequently the plaintiff filed an amendment to the petition. The controlling question is whether the petition and amendment thereto when considered together are subject to a general demurrer. The amendment sets out that at the time of the collision out of which the injuries and deaths resulting in the claims herein arose, the employees, injured and killed in such collision, were travelling to their homes by means freely chosen by themselves, and that other means of egress from the plant of the employer were available to them and were customarily used by other employees of the plaintiff; that the collision did not occur during the time or in the place or zone of their employment; and that in any event the employment was not the direct cause of the injuries and deaths. In addition, the amendment sets out many evidential facts and figures tending to show how the merit rating of the plaintiff has been and will be affected by the allowance of the claims arising from the injury and death of the employees in such collision. The amendment then states that "by reason of such claims such merit rating credit was eliminated, the plaintiff was charged and it paid the basic rates for the year 1943, or an aggregate increase in premium of $20,018.62 over what the premium would have been without such claims, and disregarding the effect of such claims in the 25% increase in basic manual rate."

The amendment concludes with these averments: "The plaintiff therefore has a direct financial interest, to the extent of $20,018.62 plus the amount of all additional premiums based on such claims in future years, in the unreasonable and unlawful allowance of the claims involved

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herein and the distribution of the state insurance fund on account thereof.

"Unless this court review and vacate, prohibit or enjoin the orders of the defendant or require the defendant to vacate and set the same aside this plaintiff will be deprived of its property without due process of law and will be denied the equal protection of the laws.

"Wherefore, plaintiff prays judgment as in its petition set forth."

Counsel for plaintiff in their brief in opposition to the demurrer make this statement:

"It was not sought by the amendment to inject a constitutional question, but to set forth beyond cavil the facts from which it is clear that, unless this court review the decisions below, the plaintiff will have been deprived of its property without due process of law and will have been denied the equal protection of the law. This court has clearly and repeatedly held that the decisions of the Industrial Commission are final only upon questions of fact, and to deny a review of questions of law involved in such decisions would be unconstitutional."

It is plain that the plaintiff challenges only the "decisions" of the commission with respect to the compensability of the claims in question. A full discussion of the problem, however, requires us to consider in a measure the question of merit rating under Section 1465-54, paragraph 3 (formerly paragraph 4) General Code.

In State, ex rel. Williams, v. Industrial Commission, 116 Ohio St., 45, 156 N. E., 101, three members of this court voted to sustain the constitutionality of Section 1465-55, General Code, which as then in force provided inter alia for the payment of compensation out of the surplus fund, and four members dissented on the ground that the statute insofar as that provision was concerned, amounted to a denial of due process. Since the votes of six judges are necessary under the Ohio Constitution to declare a law unconstitutional in a cause originating in this court, the statutory provision under consideration was held valid. Since

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the opinion has no syllabus, Rule VI (see note 94, Ohio St., ix) has no application and the concurring judges are deemed to endorse the pronouncements of law as in a per curiam opinion. With respect to due process, the language of Judge Jones at page 55, is appropriate here:

"Finally, as a controlling reason why the claim of the employer, that its property is taken without due process, cannot be sustained, is the concession that the state insurance fund does not belong to the employer. Such being the fact, due process is not available to the employer, for his property is not taken. The employer, having paid his premium to the state, has acquired not only insurance, but has also obtained immunity from suit—has obtained his quid pro quo—meanwhile the fund is held in trust by the state solely for the benefit of injured workmen and their dependents."

In State, ex rel. Powhatan Mining Co. v. Industrial Commission, 125 Ohio St., 272, 181 N. E., 99, 82 A. L. R., 938, a writ of prohibition was sought to prohibit imposing upon the relator a premium rate calculated upon merit and predicated on individual experience. Judge Jones in the opinion used this language, making special reference to the equal protection clause:

"Section 1465-54, paragraph 4 (which provided for merit rating), in our opinion, does no violence either to the federal or state Constitutions by authorizing the commission to apply to individual occupations 'that form of rating system which, in its judgment, is best calculated to merit or individually rate the risk most equitably, predicated upon the basis of its individual industrial accident experience, and to encourage and stimulate accident prevention.' Such a classification is neither unreasonable nor arbitrary; and we think its basis is fully sustained by state and federal courts. . . .

" 'A classification having some reasonable basis does not offend against that clause (the equal protection clause)

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merely because it is not made with mathematical nicety, or because in practice it results in some inequality.' "

In considering the question of due process and equal protection of the laws it is necessary to have in mind that a complying employer is not a necessary or a proper party to the proceeding under Section 1465-90, General Code, for the allowance of compensation. That statute does not provide for his being brought in. His only direct financial interest is, not in the distribution of the fund or in the fund itself, but in the creation of it, that is, in the amount of premiums he pays in the future. Since he has no such interest in the fund or its distribution and is not even a proper party to the proceeding, he is not denied a constitutional right by the allowance of a claim for compensation. He is not aggrieved, if at all, until the commission applies "that form of rating system which, in its judgment, is best calculated to merit or individually rate the risk more equitably, predicated upon the basis of its individual industrial accident experience and to encourage and stimulate accident prevention," pursuant to Section 1465-54, paragraph 3 (formerly paragraph 4), General Code. When action is taken in merit rating, which determines the amount of premium an employer is required to pay, then for the first time his financial interest is affected. True, Section 1465-54, paragraph 3 and kindred sections are silent as to recourse to the courts by an employer in matters relating to merit rating; but since paragraph 3 (formerly 4) has been held constitutional by this court (State, ex rel. Powhatan Mining Co., v. Industrial Commission, supra), and the plaintiff makes no direct attack on its provisions, or on the action of the commission as to merit rating, no further consideration need be given to the question of the constitutionality of such provision.

It is stated in the opinion on the demurrer to the petition (Copperweld Steel Co. v. Industrial Commission, supra) that it is immaterial for the purposes of this case whether the injuries and deaths were compensable or not. It may be remarked in this connection that the facts alleged do not

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show that the orders of the commission in allowing the claims for compensation were absolutely void but could be at the most merely what is denominated erroneous in judicial procedure. As heretofore indicated, such orders cannot be reviewed by this court at the suit of the employer who was not a party to the proceedings brought by the claimants, and the facts pleaded in the petition and amendment thereto do not entitle the plaintiff herein to relief by way of extraordinary legal remedy.

This court has not overlooked Section 1465-75, General Code, which provides inter alia for proceedings against the complying employer who defaults "in any payment required to be made by him or it to the state insurance fund." The plaintiff could refuse to pay a premium assessed against it and upon suit to recover the same, make its defense, if any it has. That section has no application to the present case.

The pertinent questions which the plaintiff makes other than those regarding constitutionality were fully discussed in the previous opinion in this case and what was there said is applicable here.

For the reasons given, the demurrer to the petition and amendment thereto is sustained, and final judgment entered in favor of the defendant.

Judgment for Defendant.

WEYGANDT, C. J., MATTHIAS, ZIMMERMAN and TURNER, JJ., Concur. HART and BELL, JJ., Dissent.

BELL, J., dissenting. In stating the reasons for my dissent I shall briefly review this cause from its inception.

The allegations of the original petition call to the attention of the court that the plaintiff, a corporation, * is operating an industrial plant near the city of Warren, Ohio, and is an employer contributing to the State Insurance Fund and otherwise fully complying with the workmen's compensation law of Ohio. On November 12, 1941, among the workmen employed by plaintiff were Isidoros Diamataris, Leonidas Serres, Costas Perris, Markos Mamoujelos, Antionos Spanolios and Tom Russ.

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On the night of that day these six men worked at the plant and on the next morning after they had finished they left the plant and entered an automobile driven by Isidoros Diomataris.

They proceeded some distance over a roadway to a grade crossing on land owned by the Baltimore & Ohio Railroad Company at which time and place the automobile and a freight train proceeding over the crossing came into collision causing the death of the first two named employees and injuring the remaining four.

A claim was filed by or on behalf of each of such employees with the Industrial Commission (hereinafter called the commission) and on June 11, 1943, the commission entered an order in each cause finding that the claimant was entitled to participate in the State Insurance Fund. Plaintiff was notified of the findings and orders and thereafter filed a petition with the commission for rehearing and reconsideration of the claims and orders. Upon rehearing the commission again entered its orders allowing the claims. The plaintiff alleges in detail the facts with reference to the collision between the automobile and the train, and also reasons why the claims should have been rejected.

The prayer, in brief, is that the orders be set aside, vacated and reversed and that the claims be disallowed, that a writ issue prohibiting and enjoining the commission from continuing such orders in effect or making payments thereunder and from taking into consideration any payments made thereunder in the merit * or individual rating of the plaintiff's workmen's compensation risk.

To this petition the commission (defendant) filed a general demurrer.

In *Copperweld Steel Co.* v. *Industrial Commission,* 142 Ohio St., 439, by a unanimous decision, this court held that the petition was demurrable upon the ground that the Workmen's Compensation Act does not grant the employer the right to a review of an order made by the commission awarding compensation to an injured employee.

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Thereafter plaintiff filed an amendment to the petition in which it is alleged that the commission assessed and the plaintiff paid for the year 1943 an aggregate increase in premium of $20,182.62 over the amount the premium would have been without such claims and that plaintiff will be charged with additional amounts by way of increased premiums in future years based upon the allowance of such claims.

The commission again has demurred upon two grounds, (1) that the petition and the amendment thereto do not state facts sufficient to constitute a cause of action, and (2) that several causes of action are improperly joined.

The majority of the court has concluded that the demurrer to the petition and the amendment should be sustained and the petition dismissed.

With that conclusion I am unable to agree.

Under the provisions of the Workmen's Compensation Act every employer who employs three or more persons regularly in the same business is amenable to the act and complying employers are protected against actions at law for damages for death or injury to employees sustained in the course of their employment. The employee is guaranteed compensation for any injury sustained in the course of and arising out of his employment and the dependents of an employee, in case death ensues, under like circumstances are granted compensation. The act further provides that employers amenable thereto, with the approval of the commission, may become self-insurers. All employers, therefore, who employ three or more persons regularly in the same business, of necessity fall within one of three classifications. (1) Complying employers; (2) noncomplying employers; or (3) self-insurers. The first class pays premiums into the State Insurance Fund, the latter two classes do not.

The commission fixes the amount of the premium that complying employers must pay into the fund based upon the classification of the business and the amount of losses incurred against the fund on account of injuries and death

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of the employees of such employer. It follows that the greater the number of compensable deaths or injuries occurring during any one year the greater the amount of premiums payable by the employer.

In my view of this case two constitutional questions must be considered. (1) Is the complying employer being deprived of his property without due process of law? (2) Is the complying employer being granted the equal protection of the law?

Let us briefly analyze what happens to each class of employers when an employee is killed or injured.

Class No. 1 Complying Employers—Where an employee of a complying employer is killed or injured claim is made to the commission and if an award is granted compensation is paid out of the State Insurance Fund. The employer has no voice in the matter. There is no forum wherein such complying employer can set up the defense that the injury or death did not occur in or arise out of the employment even though that be the fact.

By the provisions of the statute every award granted by the commission results in an increase in the * premium which the complying employer must pay for the ensuing years.

The net result is that whether an award is rightfully or wrongfully made the complying employer cannot be heard to complain.

Class No. 2 Non-complying Employer.—Where an employee of a non-complying employer is killed or injured the employee or in case of death his dependents have a choice of remedies. A civil action may be maintained for such death or injury against such employer or application may be made to the commission, and it may make an award and certify the same to the Attorney General who shall institute a civil action against such employer to compel payment. However, in either event, the non-complying employer may defend any action brought against him upon the ground that the death or injury did not occur in the course of or arise out of the employment. If such defense

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be established the non-complying employer is not required to pay for the death or injury of such employee.

Class No. 3 Self-insurers.—When an employee of such self-insurer is killed or injured, application is filed with the commission by the injured employee or by his dependents in case death ensues and, if an award is granted, the employer, if an action be instituted to compel payment of the award, may defend upon the ground that the death or injury did not occur in or arise out of the employment.

It is self evident that the non-complying and the self-insuring employers before being compelled to pay any award or damages have the legal right to have determined the question as to whether the injury or death occurred in or arose out of the employment. The complying employer has no such right. This court has held frequently that a complying employer has no right to review an order of the commission awarding compensation.

• It is a matter of such common knowledge that judicial notice should be taken of the fact that the commission considers thousands of claims each year and like all human agencies undoubtedly it makes mistakes. In some cases claims are allowed that should be rejected and some persons are compensated who should not receive compensation. In cases where awards are erroneously granted by the commission it is neither just nor equitable that the complying employer be required to pay extra premiums on account thereof. Requiring such payments results in penalizing the complying employer by placing him upon a different basis than the self-insurer or the non-complying employer.

In this case the court goes a step further and decides, in effect, that even though the employer is compelled to pay large sums of money in additional premiums for a period of years by reason of erroneous awards of compensation made by the commission, still the complying employer cannot maintain an action to prohibit the commission from assessing and collecting such additional premiums.

If the complying employer has no remedy the assessment and collection of premiums based upon awards granted by

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the commission to a claimant not entitled thereto amounts to the taking of such employer's property without due process of law.

This court has never squarely decided whether the complying employer has a remedy. It would seem from one statement in the majority opinion that the remedy of the complying employer under such circumstances is to refuse to pay the premium assessed by the commission and when suit is instituted to collect such premium the complying employer may make a defense if he has one.

If that be his exclusive remedy then in my judgment the complying employer is not afforded the equal protection of the law.*

Without quoting in detail all the provisions of the statute, suffice it to say that after the commission has determined the amount owed to the fund and notified the employer thereof such amount so determined shall be paid within ten days and upon failure so to do the commission shall certify the finding to the Attorney General who shall "forthwith institute a civil action against the employer." Such employer is granted ten days to answer and to execute a bond *in double the amount claimed*, with sureties satisfactory to the commission, conditioned that he or it will pay any judgment and costs rendered against him or it for such premiums and upon failure to give such bond it becomes the mandatory duty of the court to appoint a receiver to take charge of the employer's business.

If the employer is relegated to that remedy his cause is lost as soon as suit is instituted for the reason that he could not claim that he did not owe at least a part of the assessed premium.

In the majority opinion it is said that Section 1465-75, General Code, has no application to the present case. If

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* Section 1465-75, General Code, provides in part:

"If any employer who has complied with this act shall default in any payment required to be made by him or it to the state insurance fund for a period of ten days after notice that such payment is due, the same proceedings may be had as in the case of an employer against whom the commission has made a finding as hereinbefore provided."

the complying employer in this case had refused to pay the premium as fixed by the commission and an action had been instituted to require the payment thereof that section by its very language would certainly be applicable.

In addition thereto if the employer had failed to pay the premium the corporation, its president, secretary, general manager or managing agent, each would be personally subject to fine and imprisonment (Section 1465-69a, General Code) and the corporation if sued by some injured employee during the period of non-compliance would be barred of all common-law defenses. To require the complying employer to undergo those hazards in order to review the correctness of an award made by the commission, none of which is required of a self-insurer, does not afford the complying employer equal protection of the law, nor does it afford him a remedy in the ordinary course of the law.

The functions of the commission in granting awards to claimants and in fixing premium ratings are *quasi*-judicial. We have held upon numerous occasions that a writ of prohibition is the appropriate remedy to keep administrative tribunals within the limits of their jurisdiction. See *State, ex rel. Arey, v. Sherrill, City Manager*, 142 Ohio St., 574, 53 N. E. (2d), 501, and cases cited therein.

In the instant case all of the facts being admitted by the demurrer, upon those admitted facts, the commission was without jurisdiction or authority to grant any award of compensation to any of the six claimants and after having done so, it was without jurisdiction or authority to consider such awards in fixing the premium for the ensuing years thereby increasing such premiums.

In my opinion the petition and the amendment thereto state facts sufficient to entitle the plaintiff to relief by this court if the allegations thereof be sustained by proof.

As to the second ground of the demurrer all of the claims grow out of one accident and the allowance of those claims was the basis of the increase in the amount of premiums, and therefore there is no misjoinder of causes of action.

The demurrer therefore should be overruled.

HART, J., concurs in the foregoing dissenting opinion."